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In the Supreme Court

OF THE

United States

October Term, 1933

GRACE LEWIS CONNELL, MERLE C. ADAMS, and MARY ADAMS,
Petitioners,

vs.

EVA S. WALKER,
Respondent.

No.....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA AND BRIEF IN SUPPORT THEREOF.

PETITION

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Dakota entered on July 17th, 1933, affirming the decision of the District Court of Ramsey County, North Dakota, Second Judicial District.

STATEMENT OF MATTER INVOLVED

This case reached the Supreme Court of the State of North Dakota, on appeal from a judgment of the Dis-

trict Court of Ramsey County in that state entered June 25, 1932.

Respondent commenced the action against petitioners in that county on December 1st, 1931. All parties were then, and now are, residents of Los Angeles County, California. On the same day the action was filed, an attachment was issued out of said court and 520 acres of land situated in that county were levied upon *as if* the property of petitioner Connell. The complaint set forth as its first cause of action a promissory note for $3500 executed and delivered by petitioner Connell to respondent, dated Nov. 1, 1930, and unpaid. A second cause of action set forth that for many years petitioner Connell had been the owner of the land attached; that on or about June 12th, 1931, while so indebted to respondent, said petitioner had made a conveyance, or purported conveyance, of the same to petitioners Adams for a stated consideration of $10.00; that such conveyance had been actually recorded in the office of the Register of Deeds of that county on July 10, 1931, but that it did not contain, as required by the recording acts of North Dakota (Chap. 249, Session Laws 1929) the postoffice address of the grantees; and that such conveyance had been made without consideration and with intent to hinder, delay, and defraud the creditors of the grantor. (See Complaint: R. p.....) It was specifically alleged "that such transfer of said real estate has rendered the said defendant Grace Lewis Connell wholly insolvent." (R. p. ....., lines.....) Respondent asked for judgment against said Connell for

the amount due on said note, for cancellation of the record of said conveyance; for nullification of the transfer as a fraud on creditors; and for appropriation of the property as that of petitioner Connell, to the satisfaction of respondent's claim.

On February 24, 1932 (and, therefore, within four months of the commencement of the action and levy of the attachment), petitioner Connell was adjudged a bankrupt in the United States District Court at Los Angeles, California. A few days thereafter, petitioners served and filed in said action a joint answer admitting the indebtedness (first cause of action), denying the fraud in the transfer, and setting out a separate and further defense as follows:

"1. Allege that on the 24th day of February, 1932, at Los Angeles, California, the defendant Grace Lewis Connell filed in the District Court of the United States for the Southern District of California, Central Division, her petition alleging that she was by occupation a housewife, and had resided and had her domicile and principal place of business for the greater portion of six months next immediately preceding the filing of said petition, at Los Angeles, California, within said judicial district; that she owed debts which she was unable to pay in full; that she was willing to surrender all her property for the benefit of her creditors except such as was exempt by law, and desired to obtain the benefit of the Act of Congress relating to bankruptcy. She accompanied said petition with a schedule marked "A", and verified by her oath, containing a full and

true statement of all debts and (so far as it was possible to ascertain) the names and places of residence of her creditors, and such further statements concerning said debts as were required by the provisions of said Act; that she also accompanied said petition by a schedule marked "B" and verified by her oath, containing an accurate inventory of all her property, both real and personal, and such further statements concerning said property as were required by the provisions of said Act; and she prayed in said petition that she be adjudged by the Court, bankrupt within the purview of said Act.

"II. That said defendant Grace Lewis Connell has been for several years, and now is a resident, and has had her domicile and principal place of business, and now has the same in the City of Los Angeles in the Southern District of California, Central Division, of the United States District Court; that in said schedules the claim of plaintiff herein is set forth as one of her debts, and there is listed her equity and interest in all the real estate described in the complaint herein.

"III. That on the 24th day of February, 1932, in said proceedings the defendant Grace Lewis Connell was adjudged a bankrupt by the United States District Court of the Southern District of California, Central Division.

"IV. That the attachment in this action was levied on or about December 1, 1931, and therefore within four months of the filing of said petition in bankruptcy.

"WHEREFORE defendants pray that this action

be either dismissed or that all proceedings herein be stayed until the final disposition of said bankruptcy proceedings." (R. p. ....., line ....., to p. ....., line .....)

About the same time, respondent caused said action to be placed upon the trial calendar for a term of court convening in that county March 7, 1932, and petitioners, with their said answer, served a notice (R. p. .....) that at the opening of said term of court, they would move for a stay of all proceedings until termination of the bankruptcy matter, and that said motion would be based upon the answer aforesaid verified by petitioner Connell, an affidavit of John A. Jorgenson attached thereto setting out the proceedings in bankruptcy (R. p. .....), and an exemplified copy of the adjudication in bankruptcy. (R. p. .....) The motion was duly submitted to the court upon the complaint, verified first amended answer, Jorgenson affidavit, and exemplified copy of adjudication in bankruptcy, and on April 2, 1932, denied. (R. p. .....)

Thereafter, the case came on regularly for trial. No further evidence of what was transpiring in the bankruptcy proceedings was offered by any party, Petitioners continued to object to further action in the state court because of the pendency of the bankruptcy proceedings. (R. p. .....) Petitioners particularly insisted that the attachment be dissolved and that the second cause of action be dismissed because the attachment lien had been nullified by the bankruptcy, and under the law in North Dakota, no mere general creditor was entitled to set aside an alleged fraudulent transfer, but

such creditor must have a lien. (Union Nat'l Bank v. Oium, 3 N. D. 193, 54 NW 1034, 44 ASR 533; approved in opinion sought to be reviewed: R. p. .....) Petitioners offered no evidence except the adjudication in bankruptcy, relying solely upon the legal questions thus presented. (R. p. .....) Respondent offered evidence upon all the allegations of the complaint, and also, the attachment proceedings. (Which were not set forth in the complaint.)

Thereupon the court made its findings of fact (R. p. .....), conclusions of law (R. p. .....), and judgment (R. p. .....) in favor of the respondent. These gave respondent the following relief: (1) Judgment in rem for the amount due on the promissory note against petitioner Connell; (2) cancelled the record of the deed as contrary to the recording acts of North Dakota; (3) set aside the conveyance from Connell to the Adamses as fraudulent and void, and decreed the property to be that of petitioner Connell.

The trial court expressly found as a fact (R. p. .....):

"XI. That the said defendant, Grace Lewis Connell, has no other land or property within this state out of which the plaintiff can realize on her claim herein, and has no land or property in any other state, and that such transfer of said real estate (June 12, 1931) has rendered the said defendant, Grace Lewis Connell, *wholly insolvent.*"

The trial court also expressly decreed:

"V. (R. p. ——, etc.) that the said premises, or so much thereof as may be necessary, be sold by the sheriff

of Ramsey County, North Dakota, to satisfy the amount due plaintiff by virtue of this judgment, and that the defendants and each and all of them, *and all persons claiming under them or thru them or either or any of them subsequent to the commencement of this action,* be and they are forever barred and foreclosed of any and all right, claim, lien, interest or equity in and to said premises or any part thereof, save only the right of redemption as provided by law, and that the right, claim, title, interest or encumbrance of said defendants or either or any of them, if any, in and to said premises, is subsequent to and subject to plaintiff's said lien (attachment) herein."

This judgment, and all rulings of the trial court throughout the proceedings, the Supreme Court of North Dakota has affirmed, except possibly, the italicized portion of the judgment, *supra.* The opinion of the North Dakota Supreme Court, though not perhaps expressly saying so (and not necessarily required to), indicates that the trustee in bankruptcy and those claiming under him may assert the nullity of the attachment under Sec. 67f of the Bankruptcy Act.

QUESTION PRESENTED

Does Section 67f of the Bankruptcy Act nullify liens obtained on non-exempt property through legal proceedings, while the debtor was insolvent and within four months of bankruptcy, against all the world or merely against the trustee in bankruptcy (and those claiming under him)? In other words, may the bank-

rupt, or alleged fraudulent transferee of the bankrupt's property, assert such invalidity?

REASONS FOR GRANTING THE WRIT

Petitioners claim that the decision of the Supreme Court of North Dakota is contrary to the rulings in Chicago B. & Q. Railway Company vs. Hall, 229 U. S. 511, 57 L. ed. 1306, 33 Sup. Ct. 885 (decided June 9, 1913, holding liens obtained thru legal proceedings against the bankrupt within four months of bankruptcy void against all the world) and other cases hereafter cited.

However, the highest courts in various states handing down decisions since Chicago vs. Hall, *supra,* are in disagreement as to the construction and application of that case. Petitioners presented that decision in vain to the Supreme Court of North Dakota and that court is supported by the following decisions rendered subsequent to Chicago vs. Hall, *supra:*

Smith v. First, 76 Colo. 34, 227 P 826, decided July 7, 1924;

Kobrin v. Drazin, 77 NJ Ch 400, 128 A 796, decided May 7, 1925;

Swaney v. Hasara, 164 Minn. 416, 205 NW 274, decided Oct. 9, 1925;

Martin v. Green, 166 Minn. 405, 208 NW 21, decided Mar. 19, 1926;

Donahue v. Kohler, 81 Colo. 244, 254 P 989, decided Apr. 4, 1927;

Cadwallader v. Dulac, 128 Mc. 519, 149 A 142, decided Feb. 21, 1930;

Neugent v. United, 202 Wis. 93, 231 NW 600, decided June 23, 1930.

But, the highest courts in other states in decisions subsequent to the Hall case, support the claims of petitioners:

People's v. Maxson, 168 Iowa 318, 150 NW 601, decided Jan. 12, 1915;

Greenberger v. Schwartz, 261 Pa. 265, 104 A 573, decided May 8, 1918;

Duke v. Low, 135 Ore. 460, 196 P 45, decided Mar. 3, 1931;

Anderson v. Billingsly, 46 SD 17, 189 NW 986, decided Sept. 29, 1922;

Republic v. Foster, 95 Conn. 551, 111 A 839, decided Dec. 22, 1920;

Archenhold v. Schaefer, Tex. CA, 205 SW 139, decided June 19, 1918.

The following cases decided *prior* to Chicago v. Hall, *supra,* and, therefore, overruled, we think (as appears more fully in the accompanying brief), support the Supreme Court of North Dakota:

Frazee v. Nelson, 179 Mass. 456, 61 NE 40, decided Sept. 4, 1901;

Hutchins v. Canters (Tex. C. A.), 66 SW 138, decided Jan. 8, 1902;

New Orleans v. Griscom, 79 Miss. 662, 31 So. 336, decided Feb. 10, 1902;

Lamorelle v. Nass, 30 Pa. Super. 190, decided Mar. 12, 1906;

Rochester v. Locke, 72 NH 22, 54 A 705, decided Mar. 12, 1906;

Clement v. King, 152 NC 456, 67 SE 1023, decided May 4, 1910;

Miller v. Barto, 247 Ill. 104, 93 NE 140, decided Oct. 28, 1910.

And the following cases (some since the Hall case) though merely dictum, affirm the principle:

McKenney v. Cheney, 118 Ga. 387, 45 SE 433, decided Aug. 12, 1903, (involving exempt property where homestead waived by contract, but asserting lien obtained through legal proceedings void only against trustee, citing: Powers v. Nelson, 10 N. D. 580, 88 NW 705; Woodruff v. Cheeves, 105 Fed. 601, 44 CCA 631; In re Wells, 105 Fed. 762);

Equitable v. Miller, 164 Ga. 49, 137 SE 771, decided Apr. 12, 1927, and same case on higher appeal, 36 Ga. A. 746, 138 SE 282, decided May 11, 1927, involving conditional sales contracts (but opposite result reached on former hearing: 35 Ga. A. 184);

Taylor v. Buser, 167 NYS 887, decided Dec. 8, 1917 (involving lien through legal proceedings against wages earned after adjudication in bankruptcy on debt not dischargeable);

Wade v. Bank, 216 Ala. 539, 113 So. 617, decided June 30, 1927, (involving mortgage only);

Cohen v. Utter, 152 Ga. 157, 108 SE 538, decided Sept. 30, 1921, (involving a judgment within four months of bankruptcy on notes waiving homestead and

exemptions, one judge dissenting on strength of Chicago vs. Hall, *supra).*

Other cases (prior to the Hall case) support the claims of petitioners:

Hall v. Chicago, 88 Neb. 20, 128 NW 645, decided Nov. 26, 1910, (citing Wise v. Lead, 123 Mo. A. 249, 100 SW 680; Armour v. Wynn, 119 Ga. 683, 46 SE 865; Wood v. Carr, 115 Ky. 303, 73 SW 762; Alexander v. Wilson, 144 Cal. 5, 77 P 706; Thompson v. Ragan, 117 Ky. 577, 78 SW 485; In re Beals, 116 Fed. 530; Clarke v. Larremore, 188 U. S. 486, 23 S. Ct. 363, 47 L. ed. 555);

Cavanaugh v. Fenley, 94 Minn. 505, 103 NW 711, 110 ASR 382, decided May 19, 1905, (disapproved, however, on the point involved here in Swaney v. Hasara, 164 Minn. 416, 205 NW 274, and Martin v. Green, 166 Minn. 405, 208 NW 21);

Hobbs v. Thompson, 160 Ala. 360, 49 So. 787, 18 Ann. Cas. 381, decided June 5, 1909;

Kellogg v. Schmidt, 101 Ill. A. 209, decided Mar. 18, 1902;

Wright v. Sanders, 142 Mo. A. 50, 125 SW 517, decided Feb. 7, 1910;

Klipstein v. Allen, 136 Fed. 385, 69 CCA 229, decided Jan. 11, 1905;

White v. Schloerb, 178 U. S. 542, 20 S. Ct. 1007, 44 L. ed. 1183, decided May 28, 1900;

Bank v. Staake, 202 U. S. 141, 26 S. Ct. 580, 50 L. ed. 967, decided Apr. 30, 1906;

Janes v. Beach, 1 Mich. N. P. 94, decided 1869.

It thus appears, we think, that the decision of the Supreme Court of North Dakota is in definite conflict with the Bankruptcy Act itself, and applicable decisions of this court; but, notwithstanding such conflict, the construction and application of such law and such decisions have been rendered doubtful by subsequent decisions of the highest courts in various states; that the administration of the Bankruptcy Act throughout the land, with reference to the question presented, lacks uniformity; and, consequently, that the question is of sufficient importance and debate to call for this Court's power of supervision.

WHEREFORE petitioners respectfully pray a writ of certiorari issue.

JOHN A. JORGENSON,
Counsel for Petitioners.

September 18th, 1933.

BRIEF IN SUPPORT OF PETITION

OPINION BELOW

The opinion of the Supreme Court of North Dakota is reported in ..... Northwestern ..... (Advance Sheets).

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered July 17, 1933, and became final fifteen days later. Jurisdiction is conferred upon this court by Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937 (USCA, Title 28, Sec. 344 (b)).

STATEMENT OF THE CASE

The facts are stated in the preceding petition.

STATUTE INVOLVED

Bankruptcy Act of July 1, 1898, c. 541, Sec. 67, 30 Stat. 564 as amended Feb. 5, 1903, c. 487, Sec. 16, 32 Stat. 800; June 25, 1910, c. 412, Sec. 12, 36 Stat. 842:

"Sec. 67(f) That all levies, judgments, attachments, or other liens, obtained thru legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void *in case he is adjudged a bankrupt*, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same. and shall pass to the trustee as a part of the estate of the bankrupt, unless the court, shall, on due notice, or-

der that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect. Nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

ASSIGNMENT OF ERROR

The courts below erred in refusing to stay all proceedings in the State Court pending termination of the bankruptcy proceedings; in trying an action based solely on an admitted debt dischargeable in bankruptcy and a lien nullified by the adjudication in bankruptcy; in rendering judgment on such a debt, *in rem*, based on the continued existence of such lien, and appropriating the attached property to the payment of a single creditor.

THE ARGUMENT

The Decision of the Court Below That the Lien Under Sec. 67(f) of the Bankruptcy Act Is Avoided Only As to the Trustee Is In Conflict With the Express Provisions of the Bankruptcy Act and Decisions of This Court.

It will be observed in the Statute quoted, such lien is avoided "in case he (the debtor) is adjudged a bank-

rupt." There is no additional requirement that it further appear a trustee was appointed or the bankruptcy court laid claim to the property.

Yet state courts have persistently read into this provision conditions and exceptions. In an early case (Rochester v. Locke, 72 NH 22, 54 A 705, decided Feb. 3, 1903, *supra),* the Supreme Court of New Hampshire says:

"The peculiar language used raises the question by whom and when are such liens to be deemed 'null and void' and the property affected deemed 'wholly discharged and released therefrom?' The inquiry is answered by the general purpose of the Act and the language of the section. The property, by the section, is to pass to the trustee as a part of the estate of the bankrupt. From this it follows that in any controversy between the trustee and the lienholder, and in any proceeding in relation thereto for the purposes of the act, the lien is to be deemed null and void. Further than this, the act does not go." And this New Hampshire case is cited in practically all subsequent cases on the question, even by the Supreme Court of North Dakota.

As we view it, however, this language of the New Hampshire Supreme Court has been overruled by Chicago B. & Q. Railway vs. Hall, *supra,* (229 U. S. 511, 57 L. ed. 1306, 33 Sup. Ct. 885, decided June 9, 1913) where the court says:

"Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four months' period in which a creditor cannot obtain an advantage

over other creditors, nor a lien against the debtor's property. 'All liens obtained by legal proceedings' within that period are declared null and void. *That universal language is not restricted by the later provision that 'the property affected by the lien shall be released from the same and pass to the trustee as a part of the estate in bankruptcy.'*"

In the cases decided by the Supreme Courts of Colorado, New Jersey, Minnesota, and Maine (cited *supra),* wherein, since the decision in Chicago v. Hall, *supra,* they held the lien is avoided only as to the trustee—it appeared that the bankruptcy proceedings were terminated, and no claim made to the property in such bankruptcy proceedings. They argue that it thus appears the Bankruptcy Court has abandoned the property, and on termination of the bankruptcy proceedings, it reverts to the bankrupt in the condition it was in before institution of the bankruptcy, i. e., subject to the lien. However this court has recently said (Isaacs v. Hobbs, 282 U. S. 734, 51 Sup. Ct. 270, decided Feb. 24, 1931) that the Bankruptcy Court is "powerless" to abandon the bankrupt's property.

The Supreme Court of Iowa (People v. Maxon, 168 Iowa 318, 150 NW 801, decided Jan. 12, 1915, *supra),* in one of the leading state opinions in favor of petitioners, presents some of the arguments pro and con as follows:

"As to the 80 acres of land outside the homestead, appellant contends that the bankrupts, the Maxsons, cannot claim the benefit of section 67f of the Bankruptcy Act, so as to make void the judgment of plain-

tiff which had become a lien upon the 80 acres prior to the bankruptcy; that the purpose of the Bankruptcy Act, under section 67f, was to allow the trustee to claim the benefit of section 67f if he desired; that in this case the trustee set aside the homestead, asserted no right to the 80 acres, and was discharged without giving any deed to the 80 acres; that plaintiff bank relies upon the lien of this judgment upon the 80 acres. They say that section 67f does not avoid levies, liens, etc. against all the world, but only against the trustee in bankruptcy, citing cases, which, as before stated, have been reviewed by the Supreme Court of the United States in the Hall case. That section 67f confers rights only upon the trustee, not upon the bankrupt, and that only the trustee, or those holding under him, can claim the benefit of the section. The argument is that the purpose of section 67f of the Bankruptcy Act is to vest in the trustee the property of the bankrupt, and, had the trustee claimed the property, his rights would prevail as against the lien of the judgment of the plaintiff under that section; that the trustee did not choose to assert title to the remaining 80 acres, and was discharged by the bankruptcy court on the closing of the bankrupt estate. It is admitted by appellees that on and before March 26, 1908, the date of the filing of the petition in bankruptcy, plaintiff's judgment was a lien on the 80 acres, but that, because the judgment and lien was within four months, the lien was void or annulled. . . .

"Some of the discussion of the Bankruptcy Act in the first paragraph of the opinion is applicable here.

Under the decisions, plaintiff's judgment lien ceased to be a lien on the land, because the Maxsons were adjudged bankrupts within four months from the time of the rendition of the judgment. C., B. and Q. R. R. Co. v. Hall, supra; In re Forbes, 26 Am. Bankr. Rep. 255, 186 Fed. 79, 108 CCA 191; In re Tune, D. C., 8 Am. Bankr. Rep. 285, 115 Fed. 996.

"It has been held that it is not only a right, but a duty, of the trustee to refuse to take possession of property that is scheduled as an asset, unless it will be beneficial to the general creditors (In re Dillard, 2 Hughes, 190, 7 Fed. Cas. 703; Glenny v. Langdon, 98 U. S. 20, 25 L. ed. 43), and that, if the trustee renounces and abandons assets, the title to the same reverts to the bankrupt. The creditors are estopped from thereafter insisting that the property which was abandoned shall be considered a part of the estate. Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. ed. 915; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. ed. 609; Taylor v. Irwin, C. C. 20 Fed. 615.

"As before stated, counsel for plaintiff contend that the Bankruptcy Act only avoids the lien in favor of the trustee, and cites cases to support the contention. But as shown, the Supreme Court of the United States, in the Hall Case, supra, holds that the effect of the statute is to annul the lien both as to nonexempt, as well as to exempt, property. When the lien was anulled, it cast the title to the property upon the trustee, and the trustee represents the creditors. In re Kreuger, D. C. 27 Am. Bankr. Rep. 440, 196 Fed. 705.

"Afterwards the creditors must work out their claim thru the trustee. If the trustee refuses to take possession of any property because he thinks it is a burden, the court, upon application of a creditor, could investigate the question. The trustee may act wisely or unwisely in so doing, but, once he acts, the creditors are bound by his action, unless they ask a review by the court. Glenny v. Langdon, *supra;* In re Dillard, *supra.*"

The North Dakota Courts Should At Least Have Stayed All Their Own Actions Until Termination of the Bankruptcy Proceedings.

The Supreme Court of North Dakota has even gone beyond the Supreme Courts of Colorado, New Jersey, Minnesota, and Maine. It holds that the state courts may go forward while the bankruptcy proceedings are still pending.

When motion was made to stay proceedings in the state court at the opening of the term on March 7, 1932, it had before it a verified complaint alleging that petitioner Connell was insolvent, and an exemplified copy of the adjudication in bankruptcy within four months of the attachment. This record it would seem required a finding that the lien was null and void, since the Bankruptcy Act provides it becomes so "in case he (the debtor) is adjuded a bankrupt." The North Dakota courts seem to require that the trustee appear and claim the property. If this rule be right, the state court might proceed to judgment before the Bankruptcy Court

could function. There would be nothing to prevent the state court from trying and deciding the case on the opening day of the term, March 7, 1932, before proceedings could be had in the Bankruptcy Court for the selection of a trustee or claiming the property.

It has repeatedly been held that the filing of the petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction. (Mueller v. Nugent, 184 U. S. 1, 22 S. Ct. 269, 46 L. ed. 405; Clay v. Waters, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897.) "The filing of the petition and adjudication in the bankruptcy court brought the property of the bankrupts, wherever situated, into *custodia legis,* and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained therein, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law." (Lazarus v. Printice, 234 U. S. 263, 34 S. Ct. 851, 58 L. ed. 1305, citing Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 S. Ct. 269; Acme v. Beckman, 222 U. S. 300, 56 L. ed. 208, 32 S. Ct. 96; 49 Fed. (2nd) 745, CCA.)

This court has recently said (Isaacs vs. Hobbs, 282 U. S. 734, 51 S. Ct. 270, supra, decided Feb. 24, 1931): "Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. Mueller v. Nugent, 184 U. S. 1, 14, 22 S. Ct. 269, 46 L. ed. 405. The title and right to possession of

all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. Robertson v. Howard, 229 U. S. 254, 259, 260, 33 S. Ct. 854, 57 L. ed. 1174; Wells v. Sharp, C. C. A., 208 Fed. 393; Galbraith v. Robson, C. C. A. 216 F. 842. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. Robertson v. Howard, supra; In re Wilka, D. C. 131 F. 1004. When this jurisdiction has attached, the court's possession cannot be affected by actions brought in other courts. White v. Schloerb, 178 U. S. 542, 20 S. Ct. 1007, 44 L. ed. 1183 (where the bankrupts made the attack); Murphy v. John Hofman, 211 U. S. 562, 29 S. Ct. 154, 53 L. ed. 327; Dayton v. Stanard, 241 U. S. 588, 36 S. Ct. 695, 60 L. ed. 1190. This is but an application of the well-recognized rule that, when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession, and control of the property. Murphy v. John Hofman, supra; Wabash v. Adelbert, 208 U. S. 38, 28 S. Ct. 182, 52 L. ed. 379; Harkin v. Brundage, 276 U. S. 36, 48 S. Ct. 268, 72 L. ed. 457. Thus, while valid liens existing at the time of the commencement of a bank-

ruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. In re City Bank of New Orleans, 3 How. 292, 11 L. ed. 603; Houston v. City Bank, 6 How. 486, 12 L. ed. 526; Ray v. Norseworthy, 23 Wall. 128, 23 L. ed. 116; In re Wilka, supra; Nisbet v. Federal, C. C. A. 229 F. 644."

While, as we view it, unnecessary to a decision of this case, it will be presumed from the adjudication in bankruptcy that a trustee was appointed and qualified. (Ruhl v. Gillespie, ... W. Va. ....., 56 SE 898, 10 LRA NS 305; Stern v. Bradner, 225 Ill. 430, 80 NE 307; Janes v. Beach, 1 Mich. NP 94; Sec. 7936 Compiled Laws, North Dakota, subds 4, 15, 20, and 33; presumption conceded in opinion of North Dakota Supreme Court, R. p. ....., line .....)

BANKRUPTCY ACT. Property; Title. (Sec. 70.)

"(a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . . (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. . . . .

"(e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as defined in this title, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." (July 1, 1898, c. 541, Sec. 70, 30 Stat. 565; Feb. 5, 1903, c. 487, Sec. 16, 32 Stat. 800; May 27, 1926, c. 406, Sec. 16, 44 Stat. 667; USCA, Title 11; Sec. 110.)

The title, then, to the property here involved, if fraudulently conveyed, and any cause of action to recover the same, was manifestly in the trustee. Petitioners had a right to litigate their rights in the property, either in the Bankruptcy Court, or in a plenary action by the trustee. (Trimble v. Woodhead, 102. U. S. 647, 26 L. ed. 290; Glenny vs. Langdon, 98 U. S. 20, 25 L. ed. 43; Moyer vs. Dewey, 103 U. S. 301, 26 L. ed. 394; Ruhl vs. Gillespie, ... W. Va. ....., 56 SE 898, 10 LRA NS 305 and note.) Manifestly the question of whether or not the transfer was fraudulent must be litigated between the proper parties and in the proper forum, and any discussion or consideration of this question in the case at bar, would be, we think, improper. So far as the merits of this question are concerned, judgment has been practically rendered against petitioners by default.

"The right to sue for and subject to the payment of

his debts, effects fraudulently transferred by a party who was subsequently adjudged a bankrupt is vested *alone* in his assignees, and their failure to enforce it within the time prescribed by the bankruptcy law, does not transfer that right to creditors." (Moyer vs. Dewey, *supra*).

All action by the state court subsequent to the adjudication in bankruptcy was *coram non judice*. (Gross v. Irving, decided May 8, 1933, 53 Sup. Ct. 605. Wright vs. Sanders, 142 Mo. A. 50, 125 SW 517.)

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted, and the judgment of the Supreme Court of North Dakota reversed.

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